JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Mon Aug 15 14:11:36 2011
//caseml/case/mlj/07_-_PP_v_Karthiselvam_184436_126936_01

Public Prosecutor v Karthiselvam a/l Vengatan

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–15 OF 2008
GOPAL SRI RAM, HASAN LAH AND VINCENT NG JJCA
11 MAY 2009

Criminal Procedure — Plea of guilt — Plea bargaining — Whether accused pleaded guilty as consequence of plea bargaining — Whether plea bargaining proved

Criminal Procedure — Sentence — Adequacy of sentence — Whether court below taken into account relevant considerations — Whether sufficient regard given to public interest — Whether appellate intervention warranted

The respondent was originally charged with an offence of murder under s 302 of the Penal Code ('Code'). However, the charge was subsequently amended to one under s 304 of the Code, to which the respondent pleaded guilty. He was convicted and sentenced to a term of 13 years imprisonment from the date of his arrest. Dissatisfied with the measure of punishment, the prosecution appealed. It was submitted that the High Court had erred because it failed to take into account relevant considerations, inter alia, gruesome way in which death was caused and the fact that the respondent profited from the crime in that he stole money from the deceased. The appellant argued that he pleaded guilty to the reduced charge because he was informed by his counsel that if he pleaded guilty to the lesser charge he would receive 13 years imprisonment.

Held, allowing the appeal:

(1) An appellate court should not intervene in the discretion of the sentencing court unless the court below has erred in principle, ie, it took into account irrelevant considerations or failed to take into account relevant considerations or passed a sentence that is manifestly excessive or manifestly inadequate or not permitted by law. In the instant case, the sentence passed by the court below was manifestly inadequate having regard to the facts and circumstances of the case. The High Court failed to have sufficient regard to the public interest when determining the measure of sentence in this case (see paras 2 & 4).

(2) A plea of guilt should not be taken to automatically entitle an accused to a reduction of sentence. Based on the facts, it was clear that the court was not involved in any plea bargaining process and that there was not an iota of material to suggest that the accused was misled as to the consequence

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Mon Aug 15 14:11:36 2011
//caseml/case/mlj/07_-_PP_v_Karthiselvam_184436_126936_01

of his plea. In the circumstances, the trial court had erred in imposing the sentence. Hence the court had to intervene and enhance the sentence (see paras 4 & 6); *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27 followed.

[Bahasa Malaysia summary

Responden pada asalnya dituduh dengan kesalahan membunuh di bawah s 302 Kanun Keseksaan. Walau bagaimanapun, pertuduhan tersebut kemudiannya dipinda kepada pertuduhan di bawah s 304 Kanun, yang mana responden mengaku salah. Dia disabitkan dan dihukum dengan 13 tahun penjara dari tarikh penangkapannya. Tidak berpuas hati dengan tempoh hukuman, pihak pendakwaan merayu. Dihujahkan bahawa Mahkamah Tinggi telah terkhilaf kerana ia gagal mengambil kira pertimbangan yang relevan, antara lain, cara kejam di mana pembunuhan tersebut dilakukan dan fakta bahawa responden mendapat keuntungan daripada jenayah tersebut di mana dia mencuri wang daripada si mati. Perayu menghujah bahawa dia mengaku bersalah terhadap pertuduhan yang dikurangkan kerana dia diberitahu oleh peguamnya bahawa jika dia mengaku bersalah untuk pertuduhan yang kurang dia akan dihukum penjara 13 tahun.

Diputuskan, membenarkan rayuan:

(1) Mahkamah rayuan tidak wajar campur tangan dalam budi bicara mahkamah yang menghukum kecuali mahkamah tersebut telah terkhilaf dalam prinsip, iaitu ia mengambil kira perkara yang tidak relevan atau gagal mengambil kira perkara yang relevan atau telah memberikan hukuman yang sangat berlebihan atau yang amat tidak mencukupi atau tidak dibenarkan dari segi undang-undang. Di dalam kes ini, hukuman yang diberikan oleh mahkamah di bawah adalah amat tidak mencukupi melihat kepada fakta dan keadaan kes. Mahkamah Tinggi telah gagal untuk memberikan pertimbangan yang mencukupi kepada kepentingan awam apabila menentukan tempoh hukuman di dalam kes ini (lihat perenggan 2 & 4).

(2) Pengakuan bersalah tidak boleh dianggap sebagai memberi hak secara automatik kepada tertuduh untuk hukuman yang kurang. Berdasarkan fakta, jelas bahawa mahkamah tidak terlibat di dalam proses persetujuan akuan dan tidak ada sedikit pun keterangan untuk mencadangkan bahawa tertuduh telah diperdaya tentang akibat pengakuannya. Dalam hal keadaan tersebut, mahkamah perbicaraan telah terkhilaf dalam memberikan hukuman tersebut. Maka mahkamah terpaksa campur tangan dan menambah hukuman (lihat perenggan 4 & 6); *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27 diikut.]

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Mon Aug 15 14:11:36 2011
//caseml/case/mlj/07_-_PP_v_Karthiselvam_184436_126936_01

Notes:

For cases on adequacy of sentence, see 5(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3499–3534

For cases on plea bargaining, see 5(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2795

Cases referred to

Fu Foo Tong v PP [1995] 1 SLR 448, CA (refd)
New Tuck Shen v PP [1982] 1 MLJ 27 (folld)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)

Legislation referred to

Penal Code ss 302, 804

Appeal from:

Criminal Trial No 45–17 of 2007 (High Court, Johor Bahru)

Devanandan a/l S Subramaniam (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Respondent in person.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The respondent before us was originally charged with an offence of murder under s 302. However, when the case against him came up before the High Court on 14 January 2008, the charge was amended to one under s 304 of the Code. The respondent pleaded guilty to that charge. He was convicted and sentenced to a term of 13 years imprisonment from the date of his arrest. The public prosecutor being dissatisfied with the measure of punishment appealed to us. We allowed the appeal and enhanced the sentence to 20 years imprisonment from the date of arrest. The reasons for our decision are now produced.

[2] We begin by reminding ourselves of the principles guiding a court of appeal in a matter of this nature. The measure of sentence that should be imposed in a given case is a matter of discretion for the sentencing court. An appellate court should not therefore intervene unless the court below has erred in principle, that is to say, it took into account irrelevant considerations or failed to take into account relevant considerations or passed a sentence that is manifestly excessive or manifestly inadequate or not permitted by law. In short, an appellate court has no original discretion of its own but may only act when sentencing court has gone wrong in the sense just discussed.

[3] The complaint before us is that the High Court erred because it failed to

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Mon Aug 15 14:11:36 2011
//caseml/case/mlj/07_-_PP_v_Karthiselvam_184436_126936_01

take into account relevant considerations. Among these were the gruesome way in which death was caused and the fact that the respondent profited from the crime in that he stole money from the deceased. The statement of facts tendered by the prosecution and admitted by the accused reveal that the accused smashed the deceased's head with a grinding stone whilst the latter was asleep because he was afraid that the deceased would discover the theft.

[4] In our judgment, the sentence passed by the court below is manifestly inadequate having regard to the foregoing facts and circumstances, particularly the gruesome way in which death was caused and the absence of any truly mitigating circumstances. It is also our respectful view that the High Court failed to have sufficient regard to the public interest when determining the measure of sentence in this case. And it cannot be over emphasised that a sentencing court should 'strike a balance, as far as possible, between the interests of the public and the interests of the accused'. (*Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256, per Hashim Yeop A Sani). Lastly, the fact that the accused pleaded guilty appears to have influenced the court below to impose the sentence it did. However, it must always be remembered that a plea of guilt should not be taken to automatically entitle an accused to a reduction of sentence. As Karthigesu JA said in *Fu Foo Tong & ors v Public Prosecutor* [1995] 1 SLR 448:

> It is not axiomatic that every plea of guilty 'entitles', as it was contended by counsel to a discount of between one-quarter to one-third of what might otherwise be considered an appropriate sentence after a trial. A plea of guilt can be of no mitigating value, for example, when the evidence overwhelmingly supports a conviction.

It is quite apparent from the facts already set out earlier in this judgment that the evidence in this case overwhelmingly supports the conviction of the accused.

[5] The appellant who appeared in person before us argued that he pleaded guilty to the reduced charge because he was informed by his counsel that if he pleaded guilty to the lesser charge he would receive 13 years imprisonment. When this was put to the learned deputy, he informed us that there was nothing in his record to show that there had been a plea bargaining in the court below in consequence of which the accused had pleaded guilty. Similarly, there is nothing the appeal record provided to us to show that the court had played a role in the bargaining of a plea. In this context we find it sufficient to refer to the judgment of Wan Yahya J (as he then was) in *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27 where, after discussing some of the authorities on the subject, he said:

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Mon Aug 15 14:11:36 2011
//caseml/case/mlj/07_-_PP_v_Karthiselvam_184436_126936_01

> In all the aforementioned cases plea bargaining has been accepted as a successful ground for appeal where the bargaining involves the court and the accused. Understandably where an accused person has been given the impression that the judge is a party to the bargain, he has no reason to doubt the authority and veracity of that promise. Plea bargaining has been judiciously disapproved in the British courts because such practices often give rise to the implication of duress, pressure, prejudice and breach of promise by the judges. Recent cases have shown that the appellate courts will only interfere with the judgment of the trial court where there existed evidence of plea bargaining between the court and the defence.

And in a later passage he added:

> Plea bargaining between the prosecution and defence could only form ground for appeal if the appellant has been misled as to the consequence of his plea. As this is a latent fact peculiarly in his knowledge, it is for him to satisfy the court that he has been labouring under such a mistaken belief of law or fact at the time when he pleaded guilty to the charge.

[6] Now, applying what was said by the very learned judge in *New Tuck Shen* to the facts of the instant case, two matters appear patently clear to us. First, the court was not involved in any plea bargaining process. Second, that there is not an iota of material before us to suggest that the accused was misled as to the consequence of his plea. In these circumstances, having come to the conclusion that the High Court had erred in imposing the sentence it did, we had no alternative but to intervene and enhance the sentence.

Appeal allowed.

Reported by MF Ibrahim